DISTRIBUTED
MAY 16 1991

ORIGINAL

Supreme Court, U.S.
FILED
MAY 10 1991
OFFICE OF THE CLERK

(3)

No. 90-7675

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

IN THE MATTER OF THE WELFARE OF

R.A.V.

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEVEN C. DeCOSTER
Counsel of Record
Attorney for Respondent State of Minnesota

350 St. Peter Street
Suite 400
St. Paul, MN 55102
(612) 298-5464

18

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED	7
CONCLUSION	11

TABLE OF AUTHORITIES CITED

Page

U.S. CONSTITUTION:

First Amendment to the United States Constitution..... 1,10,11

U.S. SUPREME COURT CASES:

Boos v. Berry, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988)..... 11

Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed.2d 1031 (1942)..... 9

Cohen v. California, 403 U.S. 18, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971)..... 9

Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989)..... 11

MINNESOTA STATUTES:

Minn. Stat. § 609.2231, Subd. 4..... 5

Minn. Stat. § 609.72, Subd. 1(3)..... 9

MINNESOTA CASES:

City of Little Falls v. Witucki, 295 N.W.2d 243 (Minn. 1980)..... 9

City of St. Paul v. Mulnix, 232 N.W.2d 206 (Minn. 1975)..... 9

In Re S.L.J., 263 N.W.2d 412 (Minn. 1978)..... 9

In the Matter of the Welfare of R.A.V., 464 N.W.2d 507 (Minn. 1991)..... 6,8

State v. Hipp, 298 Minn. 81, 213 N.W.2d 610 (1973)..... 9

State v. Klimek, 398 N.W.2d 41 (Minn. App. 1986)..... 9

State, City of Minneapolis v. Lynch, 392 N.W.2d 700 (Minn. App. 1986)..... 9

OTHER:

Mari Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L.Rev. 2320, 2365-66 (1989)..... 8

St. Paul City Ordinance § 292.01..... 6

St. Paul City Ordinance § 292.02..... 6

QUESTION PRESENTED

Whether the bias-motivated disorderly conduct ordinance of the City of St. Paul, Minnesota, as authoritatively construed by the Minnesota Supreme Court, was neither vague nor overly broad in violation of petitioner's rights under the First Amendment to the United States Constitution?

Minnesota Supreme Court Held: In the Affirmative

Respondent accepts the petitioner's statement of the following:

I. OPINION BELOW

II. JURISDICTION

III. CONSTITUTIONAL PROVISION INVOLVED

IV. ORDINANCE INVOLVED

STATEMENT OF THE CASE[1]

On June 21, 1990, between the approximate hours of 1:00 and 3:00 a.m., petitioner R.A.V. was with a group of five other young white males at 291 Earl Street in St. Paul, Minnesota. The group of six comprised two groups of close friends.

Three of the first group had earlier been at the home of one of them. Then they went to the home of the fourth member to smoke marijuana. At this time, it is likely that the four did smoke marijuana and they might also have taken L.S.D.

Understandably, the versions of the members of the two groups varied with each other's as they tried to place blame on others than themselves for the acts that followed.

A fifth member of the first group arrived and the group began to travel at the direction of the latest arrival who purported to know where they could find more marijuana.

At the first house where they stopped, no one was home, and the group collectively decided to go to Mounds Park. On the way they stopped by 291 Earl Street where two of the group spoke with those in the house through the window. Then the group entered the house.

291 Earl is the residence of Arthur Miller, II. Petitioner R.A.V. was then staying at Mr. Miller's house and doing some

---

1. Since there has been no trial of these charges, respondent has attempted to state the facts based on the police reports and statements in the prosecutor's file that have been made available to the defense. Where there is conflict among the witnesses, it is noted.

painting for him. At the time, Miller's son, co-defendant Arthur Miller, III, and petitioner were in the home alone. Miller and petitioner had had some alcohol to drink.

Two members of the first group knew Miller and petitioner; the other three did not know them well, if at all. One member of the first group left early on, the four members and Miller and petitioner remaining at 291 Earl.

As to the events that followed, there is conflict among the statements. Two facts are clear. All six young men were present throughout and Miller and petitioner were the central instigators and enthusiastic supporters of the cross-burning.

There was some discussion of causing some "skinhead trouble" and of burning some niggers.

Petitioner went about the house to find the necessary materials. Petitioner and Miller set about the making of the cross. They used approximately two-feet long dowels from the legs of a broken chair they taped together to form a cross, which they then wrapped in terrycloth wraps obtained from petitioner's painting project. A propane tank was taped onto the horizontal member of the cross. Next to it was a Kleen Strip shellac thinner can containing a small amount of flammable fluid.

Once it was completed, the six young men took the cross and a can of paint thinner across the street to 290 Earl in order to plant it in the lawn and light it. It is not clear what words led to the conviction that 290 Earl was to be the place, but it

is certain that they knew the residents were black, and it is certain that petitioner and Miller were not pleased with having "niggers" in their neighborhood.

The group of six went through the fence and onto the lawn of 290 Earl, and the petitioner, co-defendant Miller, and possibly one of the others were involved in placing the cross, dousing it with paint thinner and lighting it. After the cross ignited, the group ran back to 291 Earl to hide. When the police came, the boys stayed inside as they began their production of the second and third crosses. Again, it seems apparent that the petitioner and Miller were the main instigators.

The complainant, a black male who resides at 290 Earl Street, said he heard voices in his yard and when he went to look out the window, he saw a large flame burning in his yard. Though he saw no one, the complainant heard at least two voices. He was concerned because his was the only black family living in the neighborhood. He said he didn't know who could have done this.

Though the complainant and his five children, who ranged in age from six months to nine years, had experienced other acts of vandalism and name-calling over the preceding several months, there was no evidence these six young men had been involved in any of them.

After the officers had left, the second cross was placed on the boulevard across the street from 290 Earl. Miller and petitioner were involved in the placing and lighting of it. It

is not clear whether all six of the young men were present when it was lighted.

When it was burning, the group made its way to an apartment complex at 995 McLean. There they lit a third cross in the parking lot on the northwest corner of Earl and Suburban Avenue. There are several black families in this complex.

The group then ran back to 291 Earl where they remained briefly before Miller told them to leave before his father came home. Petitioner stayed on in the Miller home as he had before.

The group, other than petitioner and Miller, claimed to be more interested in getting and staying very "high" from marijuana than in participating in the cross burnings. They claimed they stayed at 291 Earl for fear of being implicated due to their short hair if they left and were seen.

Petitioner admitted--indeed in one instance, bragged about --his involvement in the cross burning to two separate witnesses on the following day.

Pieces of a chair were found and seized at 291 Earl that matched the charred dowels formed into the cross found at the scene of the offense.

Four days after, on June 25, 1990, respondent State of Minnesota filed in the Juvenile Court for Ramsey County, Minnesota a petition charging petitioner R.A.V., in two counts, with violation of Minn. Stat. § 609.2231, Subd. 4 (assault in the

fourth degree) and St. Paul City Ordinance § 292.01 (bias-motivated assault).

On July 5, 1990, Count II was amended to charge bias-motivated disorderly conduct under St. Paul City Ordinance § 292.02 which provides as follows:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed or religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

The Juvenile Court, The Honorable Charles A. Flinn, Jr., on July 16, 1990 by order dismissed Count II, which order was by the State appealed to the Minnesota Court of Appeals. The Minnesota Supreme Court on August 3, 1990 granted direct accelerated review and by its opinion filed January 18, 1991 reversed the Juvenile Court, reinstated Count II of the petition and remanded the cause for trial on both counts. The opinion is reported at 464 N.W.2d 507 (Minn. 1991).

Petitioner R.A.V. seeks certiorari from that decision.

REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED

The acts alleged in the Count of the Juvenile Court petition here at issue involve six young white males, most of whom had been using some form of alcohol or controlled substance, who decided, between 1:00 and 3:00 a.m. on June 21, 1990, to manufacture a cross from chair dowels wrapped with paint rags, to take it into the fenced yard of the only Black family living in the neighborhood, and plant it in the yard and ignite it with paint thinner.

The Black male who headed the family in the house heard voices in his yard, went to the window, saw the burning cross stuck in his yard and called police.

Later, after police left, the same youths made, placed and burned two more crosses on the boulevard across the street from the Black family's house and in the parking lot of a nearby apartment complex.

Needless to say, there was no demonstration or meeting, apart from the acts of the six youths, then and there taking place. From the placement of the first cross on the lawn and within the fence line, it was self-evident who the cross was burned for, and to whose attention it was directed.

Moreover, at least two of the youths talked while within the yard, in a manner that got the attention of the resident inside, who came to the window where he promptly was made aware of the implicit threat conveyed by the burning cross. At 1:00 to 3:00

a.m., the perpetrators can be fairly sure that the targeted family is at home. In the dark a burning cross can readily be seen.

The Minnesota Supreme Court, at the outset of the opinion recognized the right, indeed the necessity, that society let victims and perpetrators know this is unacceptable behavior.

> Burning a cross in the yard of an African American family's home is deplorable conduct that the City of St. Paul may without question prohibit. The burning cross is itself an unmistakable symbol of violence and hatred based on virulent notions of racial supremacy.[1] It is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear.

1 See Mari Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L.Rev. 2320, 2365-66 (1989):

> There are certain symbols and regalia that in the context of history carry a clear message of racial supremacy, hatred, persecution, and degradation of certain groups. The swastika, the Klan robes, the burning cross are examples of signs--like all signs--that have no meaning on their own, but that convey a powerful message to both the user and the recipient of the sign in context. Id. (footnotes omitted).

In the Matter of the Welfare of R.A.V., 464 N.W.2d 507, 508 (Minn. 1991).

The Court went on to state that "R.A.V. does not dispute that the City may prosecute individuals who engage in such actions as he is alleged to have perpetrated," but claims the ordinance is substantially overbroad; that it potentially

censored so much constitutionally protected activities on its face that it must be completely invalidated. The Minnesota Court disagreed, and in so doing authoritatively construed the ordinance as one limited to "fighting words" in order to preserve its constitutionality. Nor is this a recent construction. The Court noted that at least as early[2] as the holding in In Re S.L.J., 263 N.W.2d 412 (Minn. 1978) identical, or like, language had been limited to "fighting words" as defined in Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed.2d 1031 (1942): "Those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

As limited to fighting words, the language of the ordinance is neither vague nor overbroad.

It is axiomatic that this Court must accept the authoritative interpretation of the St. Paul City Ordinance by the Minnesota Supreme Court.

In Cohen v. California, 403 U.S. 18, 24, 91 S.Ct. 1780, 1787, 29 L.Ed.2d 284, 293 (1971) the defendant wore a jacket on which the words "Fuck the Draft" were plainly visible, the message clearly directed not to another person but to advancing

---

2. Other like cases include: City of Little Falls v. Witucki, 295 N.W.2d 243, 245 (Minn. 1980); City of St. Paul v. Mulnix, 232 N.W.2d 206 (Minn. 1975); State, City of Minneapolis v. Lynch, 392 N.W.2d 700 (Minn. App. 1986); See State v. Hipp, 298 Minn. 81, 213 N.W.2d 610 (1973) (unlawful assembly statute upheld); State v. Klimek, 398 N.W.2d 41 (Minn. App. 1986) (Minn. Stat. § 609.72, Subd. 1(3) disorderly conduct statute upheld).

an abstract, impersonal idea. This Court held that ". . . the constitutional right of free expression is powerful medicine in a society as diverse and populous as ours."

In the case of fighting words, however, counter-argument is irrelevant, even impossible, for the words are uttered in a context where the only available responses are "fight or flight;" to abandon the neighborhood and move away or to retaliate.

Since at least two of the perpetrators of the instant cross burning spoke in the victim's yard in a manner that could be heard within, it can be inferred they wanted immediately to convey their threatening message.

Although the victim chose to call police rather than go outside to confront and retaliate against the culprits, he might have done otherwise. It is the reaction the perpetrator seeks rather than the one the victim chooses that is relevant.

When symbolic conduct is designed solely to threaten, terrorize or injure others, it is not protected by the First Amendment.

Based on its historical and cultural subtext, the burning of a cross under circumstances where it is aimed against one or a group of victims is such a threat. It is a question for the trier of fact to determine whether the actor intended that message to be conveyed to the victims; in this case, the fact finder certainly could--and necessarily would--so find.

The distinction between expressive conduct that is, and is not, afforded First Amendment protection is aptly made in this Court's decision in Boos v. Berry, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988).

There this Court held that a federal statute prohibiting picketing within 500 feet of a foreign embassy was unconstitutional as violative of the First Amendment. However, in so holding, the Court indicated its approval of another federal statute which prohibited willful acts or attempts to "intimidate, coerce, threaten, or harass a foreign official in the performance of his duties." 485 U.S. at 324-25, 99 L.Ed.2d at 347.

Pretty clearly, flag burning and the ideas expressed thereby lie on the protected side of the line, Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989), while the burning of a cross to intimidate and coerce does not.

CONCLUSION

In summary, certain types of expression are not entitled to constitutional protection; statutes should be narrowly construed to preserve their constitutionality; the legislature has a legitimate and paramount concern in limiting symbolic acts that constitute fighting words, which are threatening to those to whom directed.

Since the Juvenile Court loses all jurisdiction to require R.A.V.'s participation in a rehabilitative program when he turns

nineteen on March 13, 1992, respondent requests as prompt a disposition of this petition as may be feasible under the Court's procedures.

Respondent State of Minnesota prays the Court deny the petition for writ of certiorari filed herein.

Respectfully submitted,

Steven C. DeCoster

By: STEVEN C. DeCOSTER
Assistant Ramsey County Attorney
Counsel of Record
for Respondent State of Minnesota
350 St. Peter Street, Suite 400
St. Paul, Minnesota 55102
Telephone: (612) 298-5464

Dated: May 7, 1991

OFFICE OF THE COUNTY ATTORNEY
RAMSEY COUNTY
SUITE 400
350 ST. PETER STREET
ST. PAUL, MINNESOTA 55102

TOM FOLEY
COUNTY ATTORNEY

TELEPHONE (612) 298-4421
FAX 298-5316
& 292-7827

May 9, 1991

Joseph F. Spaniol, Jr.
Clerk of the United States Supreme Court
One 1st Street N.E.
Washington, DC 20543

RE: In the Matter of the Welfare of R.A.V.
Supreme Court File No. 90-7675

Dear Mr. Spaniol:

Enclosed for filing please find our Brief in Opposition to Petition for Writ of Certiorari in the above entitled matter.

Sincerely,

Steven C. DeCoster

Steven C. DeCoster
Assistant County Attorney

SCD/vad

Enc.

STATE OF MINNESOTA)
)
COUNTY OF RAMSEY)

AFFIDAVIT OF SERVICE

I, Victoria A. Dahlquist, being first duly sworn, deposes and says that on May 10, 1991 she served the attached Brief in Opposition to Petition for Writ of Certiorari in the above entitled matter by placing a true and correct copy thereof in an envelope addressed as follows and depositing the same, with postage prepaid, in the United States Mails at St. Paul, Minnesota:

Mr. Edward J. Cleary
Attorney at Law
409 Midwest Federal Building
St. Paul, MN 55101

Mr. Paul R. Kempainen
Special Assistant Attorney General
200 Ford Building
117 University Avenue
St. Paul, MN 55155

Victoria A. Dahlquist

Subscribed and sworn to before me
this 10th day of May, 1991.

Notary Public

CYNTHIA R NYGAARD
NOTARY PUBLIC—MINNESOTA
ANOKA COUNTY
My Comm. Expires Oct. 21 1992